Supreme Court, U.S.
FILED
OCT 15 2002
OFFICE OF THE CLERK

No. 02-218

In the Supreme Court of the United States

ROBERT W. GRINE, JOANNE D. GRINE, AND ESTATE OF MARGARET M. GRINE, PETITIONERS

v.

WILLIAM R. COOMBS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
GREER S. GOLDMAN
JOHN T. STAHR
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioners' appeal for lack of jurisdiction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Black v. *Cutter Labs.*, 351 U.S. 292 (1956)	8
Bulldog Trucking, Inc., In re., 66 F.3d 1390 (4th Cir. 1995)	6
California v. *Rooney*, 483 U.S. 307 (1987)	8
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	8
Curtiss-Wright Corp. v. *General Elec. Co.*, 446 U.S. 1 (1980)	5, 6, 7
Delaware Valley Citizens Council for Clean Air v. *Davis*, 932 F.2d 256 (3d Cir. 1991)	6-7
Grine v. *Coombs*:	
532 U.S. 1021 (2001)	2
528 U.S. 1160 (2000)	2
526 U.S. 1117 (1999)	2
National Smelting of New Jersey, Inc. Bondholders' Litigation, In re., 695 F. Supp. 796 (D.N.J. 1998)	4, 5, 6
National Treasury Employees Union v. *FLRA*, 712 F.2d 669 (D.C. Cir. 1983)	6
Sears, Roebuck & Co. v. *Mackey*, 351 U.S. 427 (1956)	5, 7
Wisconsin Liquor Co. v. *Park & Tilford Distillers Corp.*, 267 F.2d 928 (7th Cir. 1959)	6
Ziegler Chem. & Mineral Corp. v. *American Gilsonite Co.*, 332 F.2d 668 (9th Cir. 1964)	6

Statutes and rules: Page

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* 2
Freedom of Information Act, 5 U.S.C. 552 2
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.* 2
Water Pollution Control Act, 33 U.S.C. 1251 *et seq.* 2
Pennsylvania Hazardous Sites Cleanup Act, 35 Pa. Cons. Stat. Ann. §§ 6020.101 *et seq.* (West 1993) 2
Sup. Ct. R. 10(a) 8
Fed. R. Civ. P.:
Rule 54(b) 3, 4, 5, 6, 7, 8
Advisory committee note 7
Rule 60(b) 8
Rule 62 6
Rule 62(h) 3, 4, 5, 6, 7
Advisory committee note 7

In the Supreme Court of the United States

No. 02-218

ROBERT W. GRINE, JOANNE D. GRINE, AND ESTATE OF MARGARET M. GRINE, PETITIONERS

v.

WILLIAM R. COOMBS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) is unreported. The order of the district court is unreported.

JURISDICTION

The decision of the court of appeals was entered on February 27, 2002. A petition for rehearing was denied on April 23, 2002 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on July 19, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is the fourth time petitioners have filed a petition for a writ of certiorari in this case against multiple private parties and federal, state, and local governments.[1] In addition, since the initiation of this litigation, petitioners have: (1) appealed the district court's decision to the court of appeals seven times; (2) sought and been denied rehearing and rehearing en banc numerous times; and (3) sought and been denied a writ of mandamus removing the trial judge from the matter. The litigation against the private defendants is still unresolved in the district court.

1. Petitioners filed suit in 1995 in federal district court against multiple private parties and federal, state, and local government defendants. Petitioners allege that hazardous waste migrated to their property from barrels on an adjacent tract, damaging their land and living environment. In April 1996, they amended their complaint to assert claims under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, the Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, state common law, and the Pennsylvania Hazardous Sites Cleanup Act, 35 Pa. Cons. Stat. Ann. §§ 6020.101 *et seq.* (West 1993).

In their amended complaint, petitioners added the United States Environmental Protection Agency (EPA) as a defendant. Petitioners charged, *inter alia*, that the EPA had violated the Freedom of Information Act (FOIA), 5 U.S.C. 552, by failing to disclose certain documents. After numerous motions and hearings

---

[1] See *Grine* v. *Coombs*, 532 U.S. 1021 (2001); *Grine* v. *Coombs*, 528 U.S. 1160 (2000); *Grine* v. *Coombs*, 526 U.S. 1117 (1999).

regarding petitioners' claims against the EPA, the district court held a final hearing on the remaining FOIA claims and a motion for contempt that petitioners had filed against the EPA. On September 19, 2001, the court issued a decision from the bench in which it found that the EPA had fully satisfied its obligations under FOIA and that there was "an utter lack of evidence" that the EPA was in civil contempt. 9/19/01 Tr. 1-20. At the end of the hearing, the court granted the EPA's motion for certification under Federal Rule of Civil Procedure 54(b) of its order granting the EPA's motion to dismiss petitioners' amended complaint. Rule 54(b) reads in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.
> * * *

Fed R. Civ. P. 54(b). On October 22, 2001, the district court entered an order memorializing its September 19 bench decision granting the EPA's motion for Rule 54(b) certification.

The district court certified the judgment under Rule 54(b) because, as the court found, the "equities do tip in favor of certification." 9/19/01 Tr. 24. The court also found that petitioners' claims against the EPA were "distinct" from those asserted against the other defendants, rendering duplicative work in the court of appeals unlikely. *Ibid.*

At the same time, the court stayed enforcement of that judgment under Federal Rule of Civil Procedure 62(h), so as to "completely foreclose any possibility of scattered appeals." 9/19/01 Tr. 24 (quoting *In re National Smelting of New Jersey, Inc. Bondholders' Litigation*, 695 F. Supp. 796, 799 (D.N.J. 1988)). Rule 62(h) provides:

> When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Fed R. Civ. P. 62(h). The court explained that the Rule 54(b) certification and simultaneous Rule 62(h) stay of enforcement would serve to "finalize the judgments * * * for the purposes of any further action in this case at this level and insure that any appeals from judgments in this case will be simultaneously heard." 9/19/01 Tr. 25 (quoting *National Smelting*, 695 F. Supp. at 800).

2. On October 30, 2001, petitioners filed a notice of appeal of the district court's final order. In a summary order dated February 27, 2002, the court of appeals granted the EPA's motion to dismiss for lack of appellate jurisdiction. Pet. App. A1. A petition for rehearing was denied, again without opinion, on April 23, 2002. *Id.* at B1-B2.

ARGUMENT

The unreported, summary order of the court of appeals dismissing petitioners' appeal for lack of juris-

diction does not warrant review by this Court. The decision has no precedential effect, establishes no conflict, and reaches the proper result.

1. It is well settled that "the district court is permitted to determine, in the first instance, the appropriate *time when each 'final decision'* upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956). In that capacity, the district court acts as "dispatcher" to the court of appeals. *Id.* at 435-437. This Court has reiterated that rule, stressing that "[i]t is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 8 (1980).

In *Curtiss-Wright*, this Court reaffirmed both the requirement that district courts heed the general policy against piecemeal appeals and the discretion owed to trial court determinations under Rule 54(b). 446 U.S. at 8. Accordingly, an appellate court in Rule 54(b) cases must ensure that the "juridical concern[]" of "prevent-[ing] piecemeal appeals" is met, and must give the district courts' discretionary judgments "substantial deference." *Id.* at 10.

Here, the district court found that it was appropriate to prevent piecemeal appeals. As noted above, many issues remain to be resolved among numerous other parties. By issuing a stay of the judgment under Rule 62(h) after certifying it under Rule 54(b), the court sought to "finalize the judgments * * * for the purposes of any further action in this case at this level and insure that any appeals from judgments in this case will be simultaneously heard." 9/19/01 Tr. 25 (quoting

National Smelting, 695 F. Supp. at 800, and citing *Curtiss-Wright*, 446 U.S. at 13 n.3).

Petitioners do not dispute the legitimacy of the district court's determination that piecemeal appeals would not be appropriate. Rather, they contend that the mechanism employed by the district court to effectuate that determination was flawed and denied them due process. In particular, they note that Rule 62(h) allows for delaying the enforcement of judgments pending the resolution of other claims in the district court, not for preventing piecemeal appeals. Rule 62(h) is indeed a stay of enforcement, not appealability. See Fed. R. Civ. P. 62(h) advisory committee's note. The D.C. Circuit has noted that stays under Rule 62 "do not impede appeals from the stayed dispositive order; their sole purpose is to preserve the status quo while an appeal is in the offing or in progress." *National Treasury Employees Union* v. *FLRA*, 712 F.2d 669, 671 (D.C. Cir. 1983). Similarly, other courts of appeals, in reviewing judgments stayed under Rule 62(h), have proceeded with the understanding that a stay under Rule 62(h) subsequent to Rule 54(b) certification does not interfere with the appealability of that judgment. See *In re Bulldog Trucking, Inc.*, 66 F.3d 1390, 1392-1393 (4th Cir. 1995); *Ziegler Chem. & Mineral Corp.* v. *American Gilsonite Co.*, 332 F.2d 668, 669 (9th Cir. 1964); *Wisconsin Liquor Co.* v. *Park & Tilford Distillers Corp.*, 267 F.2d 928, 933 (7th Cir. 1959). See also *Delaware Valley Citizens Council for Clean Air* v. *Davis*, 932 F.2d 256, 263 (3d Cir. 1991) (observing that "[i]f the district court properly made [the Rule 54(b)]

certification, we must then exercise jurisdiction over this appeal").[2]

It is not, however, the district court's order of which petitioners seek review in this Court. Rather, they seek review of the judgment of the court of appeals. That judgment, which dismissed petitioners' appeal for lack of jurisdiction, was correct. A court of appeals lacks jurisdiction over an improperly certified appeal. See *Sears, Roebuck & Co.*, 351 U.S. at 436. And certification is improper where, as here, the district court has decided against allowing an immediate appeal because piecemeal appeals would be inappropriate in view of the large number of appeals already brought by petitioners. In other words, where a trial court determines that an immediate appeal is inappropriate and then empowers the losing party to appeal by certifying a judgment under Rule 54(b), the court of appeals may properly conclude that the lower court should not have acted in such a self-defeating manner.[3]

Petitioners do not cite a single case in which a court of appeals decided to exercise jurisdiction where a

---

[2] Rather than issuing a Rule 62(h) stay, therefore, the district court should have executed its decision to prevent piecemeal appeals by denying certification on the ground that the importance of precluding multiple appeals outweighed the equities. See *Curtiss-Wright*, 446 U.S. at 8 (discussing need to balance "equities" against "judicial administrative interests"); Fed. R. Civ. P. 54(b) advisory committee's note.

[3] In the court of appeals, we argued that the court should dismiss for lack of jurisdiction on the ground that the district court's Rule 62(h) stay precluded appellate jurisdiction. Although dismissal was the correct disposition, we now believe that the better reason for that result is that it was error for the district court to certify despite its determination that an immediate appeal would be inappropriate.

district court certified despite its decision that an immediate appeal should not lie. We are aware of none. The court of appeals, moreover, did not explain why it was dismissing for lack of jurisdiction. It thus did not announce a holding that conflicts with the decision of any other court of appeals. Review by this Court is, accordingly, unnecessary. See Sup. Ct. R. 10(a).

2. Even if it were assumed that the court of appeals relied on erroneous reasoning, this case still would not warrant further review. "This Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)); see *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Because the judgment of the court of appeals here was correct, review by this Court is not warranted.

Further, petitioners are not aggrieved by the court of appeals' decision. They did not seek Rule 54(b) certification; rather, the EPA did. Accordingly, they never sought the very ability to bring a separate appeal that was denied. At issue here is not *whether* petitioners will be able to appeal, but rather *when* they may do so. Petitioners have no due process right to an immediate appeal, particularly in this situation where the district court clearly could (and should) have denied a Rule 54(b) certification.[4]

---

[4] Nor is there any basis for petitioners to complain that they are aggrieved by their inability to litigate further against the EPA in the trial court. They have already done so extensively through numerous filings, motions, and hearings. See Pet. 4-7. And they may still move in the district court for relief from judgment under Federal Rule of Civil Procedure 60(b). In short, petitioners are currently in the same position they would have been in had the district court refused to certify.

Thus, petitioners' claim (Pet. 12) that "they have been denied their due process right of meaningful access to the courts" is without merit. Petitioners explain neither how they have been denied due process when they can appeal the judgment in favor of the EPA after all issues in the case have been resolved, nor why due process entitles them to bring an appeal prior to that time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
GREER S. GOLDMAN
JOHN T. STAHR
Attorneys

OCTOBER 2002